What will I do if it doesn't work? – Consumers, Cross-border shopping and the Law*

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INTRODUCTION – SETTING THE SCENE

The topic of this lecture is based on long-term experience of both the law relating to cross-border shopping, and being a seasoned cross-border shopper myself. I suspect there are not many people in this room who have experienced cross-border shopping from an early age. I grew up on the border between the Netherlands and Germany, and remember as a child travelling to the neighbouring Dutch city of Enschede, which offered a much wider range of shopping opportunities than the sleepy German town where I lived at the time. In the early days, there was still a proper border between the two countries, with passport controls and barriers. There were limits on the quantities of certain types of goods one could bring back from the Netherlands, especially for people living within the immediate border area. Many a time the packet of coffee (considerably cheaper in NL than in Germany) had to be hidden under the car seat, just in case. And then there was the excitement when my grandmother visited and needed petrol for her car, because that meant crossing the border (for cheaper petrol) with a car which had a numberplate from outside the region. Over time, border controls disappeared, and ultimately the border as a whole (one cannot really tell when one crossed from Germany into the Netherlands these days, except at some point the road signs change and there is a reminder of the different speed limits on Dutch roads). But cross-border shopping has always been a feature of my life as a consumer. Whether it was clothes, furniture, lamps or even certain items of food, we regularly nipped across the border to take advantage of the much greater range of what was on offer – and often at a lower price, as well. Things rarely went wrong, and whenever a problem did arise, it was easily resolved. There were some traders, e.g., on the weekly food-market, who sought to take advantage of the influx of shoppers from the other side of the border, but this was never a huge issue – and people knew from experience to look out for those kinds of traders (one

* This is the manuscript on which my Inaugural Lecture was based. The lecture itself was delivered on the basis of this manuscript but not verbatim.

friend once wanted to buy a couple of kilos – this is the continent, after all – of asparagus, but instead of taking this from the nice juicy fresh asparagus spears on display, the market trader tried to fob him off with the previous week's offering. Needless to say, unsuccessfully so).

In all of this, it never really occurred to us that by engaging in cross-border shopping, we would enter a legal minefield. Had there ever been a need to consider litigation, I am sure we would have become very familiar with the legal complexities – but thankfully, nothing ever happened. I first started to become aware of the fact that cross-border shopping creates particular legal difficulties through some of my father's freelance work as a translator for EUREGIO, an organisation based in my home town which was formally established by several municipalities on either side of the border.[1] Its broad aims included bringing the two sides of the border closer together, both through initiating a range of cross-border projects and by offering advice to citizens on a range of matters with a cross-border dimension, such as working and living in the neighbouring country, as well as basic consumer rights.

When I made the – somewhat spontaneous - decision to study law, I did so with a particular interest in European and Consumer law. I studied at Sheffield, where Geraint taught at the time, but unfortunately, I was unable to take his Consumer Law course because Geraint secured study leave that year. But I was known as the one student who confessed to liking European law, and eventually European Consumer Law became my primary area of interest. Geraint did get his opportunity to share his immense expertise when he became my supervisor for my doctoral studies – although I'm never quite sure how pleased Geraint is with the results of his efforts.
The long and short of all this is that throughout my career, I have researched and taught on the particular issues raised by cross-border shopping, and the efforts made by what is now the European Union to facilitate this.

In this lecture, I intend to explore the legal issues which arise when consumers shop across borders. This will include setting out the legal problems particular to cross-border dealings, as well as the solutions adopted by the European Union. I will also

[1] www.euregio.de

consider alternative legal solutions to the problems created by cross-border shopping.

CONSUMERS AND THE LAW

Before we turn to the specific legal problems associated with cross-border shopping, let me make a few remarks about consumer problems generally. The topic of this lecture is a question – "what will I do if it doesn't work". I suspect that if this question were asked in a purely domestic context, one would get a whole range of responses – and experience tells me that these have often very little to do with the actual legal position. For example, for our Open Days and also for the training for the Legal Advice Centre on consumer law, I use a short scenario – consumer wants a washing machine, needs a delicates/handwash programme; explains this to shop assistant who recommends a specific, and rather expensive washing machine, which comes with a 12-month guarantee. About 14 months later, various things go wrong. The question is – what can the consumer do? Unsurprisingly, the expiry of the guarantee is often regarded as fatal to any claim. The decision not to buy the extended warranty further weakens the consumer's position. At best, it is suggested, the manufacturer might help out. Few people have heard of the Sale of Goods Act 1979, and even fewer still know even in very general terms how it might be of assistance here (although this particular audience will have an unusually high proportion of very knowledgeable consumers – isn't that so, Commercial Law students??). The requirement that goods must be of satisfactory quality[2] entails consideration of the durability of goods, and an expensive washing machine used in accordance with instructions should not break down after a mere 14 months' use. And if a consumer tells a retailer about specific requirements and the retailer then recommends a particular item, then that item has to be reasonably fit for this purpose.[3] The fact that the guarantee has expired is immaterial, for the consumer's legal rights are against the retailer and are not affected by the existence of guarantees or extended warranties. But how many consumers are actually aware of this? It seems to me that the fact that awareness of consumer rights in a domestic context is generally limited has some bearing on what I will say later about the usefulness of the specific legal responses to cross-border shopping implemented or considered by the EU.

[2] S.14(2) SoGA.
[3] S.14(3) SoGA.

CROSS-BORDER SHOPPING

So, let us now move on to consider the cross-border case. We immediately encounter a first difficulty: what do we mean when we talk about cross-border shopping? When does shopping involve a cross-border element? My own childhood experiences of course suggest that popping across the border into the neighbouring country on a Saturday afternoon is one instance of cross-border shopping. A related situation is a tourist who buys various items whilst on holiday to take them back to his or her home country. But perhaps the most popular means of cross-border shopping today is the internet – I am sure there are more people in this room who have bought goods over the internet than have been involved in physical cross-border shopping. For the moment, let us regard all of these scenarios as involving cross-border shopping. I will suggest later that when it comes to adopting specific legal rules, it might not be appropriate to treat all of these cases as "cross-border" cases. More on that later.

General problems

Cross-border shopping raises a host of practical difficulties. First, it may be problematic for trader and consumer to communicate with one another if they do not both speak the same language. Although not impossible, it seems that a legal solution to deal with this practical issue is beyond reach. Secondly, there will be the question of transporting goods from trader to consumer. Small items can be posted, but what about the fridge/freezer ordered by a consumer in Hull from a retailer in Vienna? Again, this is something in respect of which the law cannot assist.

Legal Problems

But there are specific legal difficulties. By definition, any cross-border shopping situation will be affected by more than one jurisdiction. The trader is based in one jurisdiction in which one legal framework applies, and the consumer in another jurisdiction with potentially quite different rules. The first difficulty therefore is to ask which rules apply – those of the trader's or of the consumer's jurisdiction? There will be a contract – a legally binding agreement – between trader and consumer, but determining whether this contract is governed by the trader's or the consumer's law

will determine the respective duties and obligations on both parties. For example, English law is known for the fact that it does not require parties to disclose to one another any information about the product sold (even if this involves a house in which a murder was committed some time ago and body parts may still be in the house, as yet undiscovered). German law, on the other hand, requires much more by way of co-operation and disclosure. The point is that different jurisdictions have different rules. So the first difficulty is “which law applies”?

In the consumer context, this matter is made more complicated by the fact that rules introduced specifically for the protection of consumers are given a special status under national law, i.e., it is generally provided that consumer rights cannot be taken away by the terms of the contract, nor by selecting a law applicable to the contract which is not the consumer’s jurisdiction. This is what is generally known as “mandatory rules”, or sometimes “mandatory law”.
It is therefore perfectly possible to have a contract between an English consumer and a German trader, which is subject to German law except for the specific consumer rules of English law which continue to apply.
These kinds of problems fall within an area of law known variously as “Conflict of Laws” and “Private International Law”, although the former phrase perhaps better encapsulates the issue – i.e., we have two sets of legal rules in conflict. This area of law seeks to provide rules which can be used to determine which body of law applies and when mandatory rules of the consumer’s jurisdiction should be respected. Within the European Union, there is now a common set of “conflict of laws” rules in place which try to resolve questions of jurisdiction – i.e., in which court must a legal claim be lodged – and applicable law.
Although these rules are not always clear-cut, they generally tell us the jurisdiction which governs the contract, and, if it is not the consumer’s, whether the mandatory rules of the consumer’s jurisdiction must be given effect.

However, conflict of laws does not tell us anything about the substantive content of legal rules. These will continue to vary from jurisdiction to jurisdiction. Admittedly, there will be a reasonable degree of similarity at least in terms of substance/outcome, but the legal concepts and doctrines will be quite different. If we now consider the position of a trader who wants to extend his activities beyond his

home jurisdiction, there will be the difficult question of knowing which law applies whenever a new contract is concluded with a consumer from another country, and then what the content of the relevant mandatory rules might be. Conversely, from the consumer's perspective, similar questions arise – which law will apply and will I still be as well protected as I am under "my own" law? Of course, for any consumer to ask this question presupposes that he or she is familiar with their own consumer law – something which seems doubtful with regard to a significant proportion of consumers.

The question which has therefore arisen, and been the focus of legal responses, is how the effects on determining the applicable law and mandatory rules can be minimised, to the point where it does not matter to a trader or a consumer which law applies or whether one's own level of consumer protection is preserved when shopping across borders. In short: can we not make sure the law is the same wherever we are?

Without wanting to dash the hopes of some of my European colleagues, there is no realistic prospect of a single legal framework for all European countries. There are simply too many differences in terms of legal culture, legal technique and indeed the weight attached to law in everyday life for this to be worth exploring seriously. Of course, there are some who would be delighted to see a European Civil Code, but I feel pretty confident when I say that it ain't gonna happen. Nor is it necessary.

But even if not all of the law can be the same, is it possible that selected areas of law might be brought closer together? For example, would it not be possible to assimilate the mandatory rules of the EU Member States to such a degree that it would no longer really matter whether the consumer's mandatory rules applied or simply the rules from the trader's jurisdiction?

HARMONISATION OF EU CONSUMER LAW

This is essentially the task which the European Union has pursued in creating its legal framework for consumer law. It has taken selected areas of consumer law and brought these closer together. This is a process known as "harmonisation". Legislation adopted at the EU level requires that Member States adapt their national rules on consumer protection as stated in the relevant EU measure. It does not

involve the wholesale replacement of national consumer law with EU law; rather, an EU measure known as a "Directive" sets out the consumer protection requirements which each jurisdiction has to satisfy.

We therefore now have directives on areas such as doorstep[4] and distance selling,[5] controls over unfair terms in consumer contracts,[6] and rules on the sale of goods to consumers,[7] which are harmonised by EU legislation. The idea is that each national law contains similar rules, so consumers and traders both know in general terms what level of consumer protection exists.

It is at this stage I would like to go into a bit more of the nitty-gritty of the legal context of cross-border shopping, and the process of harmonisation in particular. I mentioned a few moments ago that one of the legal difficulties is the variation between different countries in the consumer protection laws, and the obligation on a trader, in certain circumstances, to comply with the consumer protection rules of another Member State. How can the EU step in to try and make things easier for such a trader?

Now, contrary to popular belief, the EU does not have *carte blanche* to adopt legislation on whichever topic it chooses, nor is the legislation which is adopted simply imposed by Brussels bureaucrats. Rather, the European Treaty (the Treaty on the Functioning of the European Union) allocates the responsibility and power to legislate for specific areas between the Member States of the EU and the EU itself.[8] The EU only has competence to adopt legislation in areas expressly mentioned in the Treaty. With regard to consumer law, the responsibility is shared between the Member States and the EU. As far as the European level is concerned, it can only legislate in the field of consumer law (i) where this would assist the establishment and operation of the internal market;[9] and (ii) to support and supplement the activities of the Member States.[10] On the whole, the EU has chosen to concentrate on the Internal Market element of its powers, and has justified the adoption of

[4] Directive 85/577/EEC.
[5] Directive 97/7/EC.
[6] Directive 93/13/EEC.
[7] Directive 99/44/EC.
[8] See *e.g.,* S.Weatherill, "Competence and European Private Law" in C.Twigg-Flesner (ed), *Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010).
[9] Art.169(2)(a) TFEU and Art.114 TFEU.
[10] Art.169(2)(b) TFEU.

consumer legislation on two grounds: first, the differences in national consumer laws act as an impediment particularly for traders to offer their products across the entire Internal Market because of the need of having to comply with 27 different sets of consumer law; and secondly, consumer confidence is dented by the lack of a guaranteed level of consumer protection throughout the EU, no matter where consumers buy goods or services. Consequently, EU legislation was felt necessary (a) to reduce barriers imposed by different consumer laws; and (b) to boost consumer confidence.

This means that the EU cannot adopt comprehensive legislation on consumer law; primarily, its focus needs to be on removing impediments to the operation of the internal market – although its use of the "consumer confidence" argument could certainly open the door to fairly broad-based legislation in this area – provided that a "lack of consumer confidence" really is an impediment to the operation of the internal market. We could spend all evening debating whether these arguments are persuasive and whether differences in the law are really so pronounced that harmonisation will magically make consumers log onto their computers and buy whatever they are looking for from anywhere in the EU. I, for one, continue to have doubts about this.[11] Be that as it may, this is the context within which the EU has operated.

As I have already mentioned, its main legislative tool has been a measure called "Directive". There are essentially two types of EU measures - Directives and Regulations.[12] In essence, Directives state objectives and outcomes to be achieved, and should leave individual Member States reasonable room for deciding how it intends to amend its national law to comply with the requirements stated in a Directive. A Regulation, on the other hand, is what is known as "directly applicable", i.e., no legislative action is required by the Member States before it takes effect. A good example of the latter is the so-called "Denied Boarding" Regulation,[13] a measure which provides air passengers with specific entitlements if they are bumped off a flight, are delayed beyond a certain period, or if their flight is cancelled. Regular

[11] For a more detailed discussion of this point, see T.Wilhelmsson, "The Abuse of the 'Confident Consumer' as a Justification for EC Consumer Law" (2004) 27 *Journal of Consumer Policy* 317-337.

[12] Article 288 TFEU.

[13] Regulation 261/2004/EC establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

air travellers will have seen notices displayed at airports, and every once-in-a-while, these rights are mentioned when there has been particularly severe disruption to air travel, e.g., caused by snow, volcanoes or strikes. Air travellers are granted these rights under a Regulation and can rely on the same piece of legislation no matter where in the EU they are, because the same measure applies throughout the EU.

This is not the case with the bulk of EU consumer law, which is based on directives. Thus, whilst there is a measure laying down particular requirements, consumers only gain access to these rights through national legislation which transposes/implements a directive into national law. Crucially, consumers cannot rely directly on a Directive – again something often misunderstood particularly in the popular press.

From a legal perspective, this means that whenever the EU has agreed a Directive – and this involves intense debate in the Council of Ministers which represents the governments of the Member States, the European Parliament which is directly elected by the people of the Member States, and then between both institutions to thrash out some kind of agreed text – it is down to each national legislature to figure out how to amend or add to national law to make sure that this is in line with what the Directive requires.[14]

Member States have got a reasonable degree of freedom – as long as national law provides the level of consumer protection mandated by a Directive, it has fulfilled its obligations under EU law. This is made even easier by a feature common to most Consumer Law Directives: instead of pursuing one fixed standard of consumer protection for all EU countries, most directives merely lay down a minimum standard of protection - this is known as “minimum harmonisation”. What this means is that the directives in question lay down a base-line standard of consumer protection below which no Member State may go, but there is nothing to stop an individual Member State from exceeding this basic level of protection. Now, it should not be assumed that minimum harmonisation means “minimal” harmonisation – the minimum level of protection required isn’t necessarily a low standard of protection (indeed, the EU Treaty requires a “high” level of protection, whatever that may mean in practice).[15] However, some Member States may either have pre-existing rules

[14] See *e.g.,* C.Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge-Cavendish, 2008), pp.36-40 and 103-113.

[15] Art.114 TFEU.

which are more favourable to consumers, or may wish to introduce more protective rules, and this has generally been possible under this so-called "minimum harmonisation" approach. For example, UK consumers benefit from the right to return goods for a full refund if they encounter a fault within a short period after purchase (although not set in stone, a guideline period would be about 30 days). The EU Consumer Sales Directive provides that repair or replacement are the primary remedies, which is less generous that UK law. The UK government chose to maintain the existing rights of consumers when it transposed the Directive (although it might not do so today following an announcement by the Business Secretary to abandon any "gold-plating" of EU rules).[16]

In many ways, this approach was the pay-off for agreeing an EU rule in the first place – some Member States might have found it politically difficult to justify a lowering of established consumer protection standards, and would therefore not have voted in favour of a uniform fixed level of consumer protection.

The long and short of all this is that whilst we now have a common baseline threshold of consumer protection across the EU (which is an achievement not to be sniffed at), we do not have a uniform set of consumer rules which cover the entirety of the EU's internal market. Rather, the 27 (or more) national jurisdictions of the EU countries each contain their own set of consumer laws, which incorporate, but are not limited to, the various EU rules.

REVIEW OF THE HARMONISATION PROCESS AND NEW PROPOSALS

In 2004, after about 20 years of legislating, the European Commission wanted to find out just what the shape of the legal landscape. It commissioned (pardon the pun) an academic study in which I was involved both as a member of the steering and editing committee, and as national correspondent for the United Kingdom. This project, completed in late 2006, is known as the *EC Consumer Law Compendium*.[17] It produced a database which tracks how each of the provisions of 8 key EU Consumer Law directives were (or were not...) transposed into the national laws of each of the 27 EU Member States – a mammoth task by itself, but in addition, a comparative analysis was undertaken to identify just how much variation there continued to be in the post-harmonisation era. To cut a long story short, our findings

[16] BIS Press-release, "Government ends 'gold-plating' of European Regulations", 15 December 2010.
[17] H.Schulte-Nölke, C.Twigg-Flesner and M.Ebers (eds.), *EC Consumer Law Compendium* (Sellier, 2008).

were that national laws continued to vary, partly because of the minimum harmonisation approach, and partly because directives only dealt with selected issues of consumer law, and so many matters were left to the Member States to sort out.

The Commission's response was interesting. It decided that the only way forward was to (a) adopt a broader single directive bringing together the various individual directives adopted thus far; and (b) move to a full or maximum harmonisation standard.[18] In many ways, this seems like a logical next step – if minimum harmonisation hasn't produced the right sort of legal framework for the internal market, then perhaps maximum harmonisation might – i.e., the introduction of one single uniform level of consumer protection from which no Member State will be permitted to deviate. It duly put forward a proposal for a Directive on Consumer Rights in October 2008,[19] which would have brought together earlier directives on doorstep selling, distance selling, sale of consumer goods and unfair terms in one measure, with one set of definitions and a number of new provisions. I say "would have brought together", rather than "will bring together", because the proposal has had such a rough ride through the legislative process that most of its provisions are likely to be abandoned altogether. When the proposal was presented, there was a flurry of academic and professional commentary, predominantly critical of the shift to full harmonisation (there are a few lone voices here and there in support), but also of the substance of the proposed measure. The Council of Ministers had several debates about this proposal and eventually, under the auspices of the Swedish Presidency, produced a detailed revision of the proposal by December 2009. However, by December 2010, its discussion had reached the point where the Council resolved to delete most provisions, leaving only a fully harmonised set of rules on pre-contractual information obligations, and the right of consumers to withdraw from a contract concluded at a distance or on the doorstep within a period of 14 days. Hardly a major achievement, but clearly indicative of what's achievable politically.

[18] *Green Paper on the Review of the Consumer Acquis* (2006) 744. See C. Twigg-Flesner, 'No sense of purpose or direction? The Modernisation of European Consumer Law' 3 (2007) *European Review of Contract Law* 198-213

[19] COM(2008) 614 final. See G. Howells and R. Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (Munich: Sellier, 2009).

The European Parliament is about to put forward its views on the proposal, and negotiations are underway to salvage whatever is possible from the ruins of this proposal.

What this means is that the harmonisation process may have reached its limits. However, if we assume that its basic premise – the need for a more or less single legal framework to encourage transactions in the internal market – remains unaltered, then something might have to take its place to ensure that what harmonisation did not achieve can finally be done. But is there an alternative?

THE EUROPEAN CONTRACT LAW PROJECT

To explore this, it is necessary to add another field of EU activity into the mix. In 2001, the EU issued a discussion paper – its *Communication on European Contract Law*.[20] In this paper, the Commission invited comments on whether it was necessary and appropriate for the EU to adopt much broader legislation in the field of contract law generally, rather than just consumer law. Now, the law of contract is the law that governs all transactions, business-to-business and business-to-consumer alike. But on the whole, many provisions of contract law are not as problematic as consumer law measures, because it is largely possible for parties to a contract to use the terms of their contract to work around the specific legal rules, albeit to varying degrees – just as national consumer protection rules vary from country to country, so the contract law systems as a whole differ. It is far beyond the boundaries of tonight's lecture to go into details of this. Indeed, the 2001 paper turned out to be the starting shot for the development of a body of legal scholarship on a new topic – "European Contract Law" – which is now so vast that it is impossible to keep up with all the publications in this field. That aside, the 2001 paper and two follow-ups[21] launched a process which resulted in the production of a massive piece of work known as the "Draft Common Frame of Reference on European Private Law". This is intended to be a kind-of restatement of private law, based on comparative study of the private law rules of the Member States. What has emerged is a new set of model rules, together with commentary explaining the scope of these rules, and notes setting out

[20] COM (2001) 398 final, 11 July 2001. See e.g., See also 'On the way to a European contract code?' (editorial comments) (2002) 39 *Common Market Law Review* 219-255.

[21] *A More Coherent European Contract Law – An Action Plan* COM (2003) 68 final; *European Contract Law and the revision of the acquis: the way forward* (2004) 651 final.

how national laws relate to these model rules. This was an academic exercise of immense proportions.[22]

In parallel to this development, the European Commission suggested that it would consider the possibility of what it termed an "Optional Instrument" on EU Contract Law. By this, it envisaged a possible contract law framework which would be EU-based and made available as an alternative to the national contracts laws of the Member States.

Fast-forward to July 2010, and a new Commission has just taken up office. The DCFR was published at the end of 2008 and looked destined to become nothing more than a major academic project. But then, the new Commissioner announced that she would take up this project again, a dedicated team of officials was brought together, and another *Green Paper* was published in July 2010 setting out possible options for future action.[23] Although a number of options were presented, it soon became clear that the Commission was really only interested in the "optional instrument" idea. At the same time, the Commission appointed an Expert Group initially tasked with narrowing down the DCFR to matters of contract law only (it was much broader, covering private law generally), but which has since been instructed to put together a draft optional instrument.

One of the matters now seriously under discussion - particularly in light of what may already be described as the failure of the Consumer Rights proposal – is the adoption of an optional instrument on B2C contracts, i.e., a more comprehensive set of consumer contract rules made available alongside the existing national consumer laws. This could be achieved by adopting a Regulation which would be directly applicable and thereby make available automatically this new set of rules as an alternative to national consumer laws. This would allow traders to offer their goods and services to consumers from other Member States on the basis of this new European set of rules, and would make it unnecessary to be familiar with all the national laws of the Member States.

[22] C. von Bar, E. Clive and H. Schulte-Nölke (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (Sellier, 2009).

[23] *Green Paper on Policy Options towards a European Contract Law for Consumers and Businesses* COM(2010) 348 final.

FROM DIRECTIVES TO REGULATIONS

What I will do in the remainder of this lecture is to explore this possibility in a bit more detail. This is a topical issue, and this has been the most recent focus of my research work.[24] The debate about the optional instrument raises a number of interesting questions, which I will address in turn.

First, the whole concept of having a set of legal rules alongside national rules, rather than replacing national rules, is novel. To my mind, it is at least a tacit acknowledgement that the process of harmonisation has not only reached its limits, but has effectively reached a point where it will be of no further useful assistance in encouraging use of the internal market. Although the process of harmonisation has done a lot to raise the general level of consumer protection across the EU – which is an achievement in its own right - it has, in my view, not produced the one outcome which had originally been pursued: the establishment of a common minimum set of rules. Although directives contain rules – in some instances fairly detailed rules – it remains necessary for national laws to give effect to these rules. Directives never operate as free-standing measures, and consumers could never rely on a directive itself in order to launch a legal claim against a trader. Under the harmonisation approach, it remained necessary to identify (a) which law applied to the transaction, and which specific consumer protection rules had to be respected; and (b) to work out the substance of that law. Whilst there might have been a broad understanding that consumers had at least the same basic level of protection no matter which law applied, this did not tell them what the precise level of protection was, nor was it always clear for traders which consumer laws they had to comply with. (The only other major achievement of the harmonisation approach has been to spawn a new subset of Comparative Law, focusing on comparative transposition studies on individual directives – but whilst this is very interesting from a legal scholarship perspective, it does not exactly further the interests of individual consumers).

[24] C.Twigg-Flesner "Time to do the Job Properly – the Case for a New Approach to EU Consumer Legislation" (2010) 33(4) *Journal of Consumer Policy* 355-375; C.Twigg-Flesner, "'Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?' – A way forward for EU Consumer Contract Law" (2011) 7 *European Review of Contract Law* (in press), and C.Twigg-Flesner, "Comment: The future of EU Consumer Law – the end of harmonisation?" in M.Kenny and J.Devenney, *European Consumer Protection – Theory and Practice* (Cambridge University Press, forthcoming). These ideas will be developed further and published in a short book in the "Springer-Briefs" series, due in the summer of 2011.

If it is assumed that there is a need for a more uniform set of consumer protection rules specifically for the operation of the internal market, then harmonising by directives is not the way to follow. Instead, it is necessary to find a way of introducing such a legal framework without the need for transposition of directives into national law. This process of transposition has simply resulted in the maintenance of 27 different consumer protection frameworks, albeit in a different constellation than in the pre-harmonisation era. But national laws remain important. There is, however, a legal mechanism in EU law which can be utilised to obviate the need for transposition, and that is the "Regulation". As I explained earlier, a Regulation is directly applicable, i.e., once adopted by the European legislature, it applies immediately in all the Member States and does not require specific action by national legislators to become effective (although steps would have to be taken in national law to remove existing national laws which are in conflict with such a Regulation). So if there is a real need for a European legal framework on consumer law, then the most appropriate way of adopting this would be by way of Regulation. There is no obvious *legal* obstacle in the way of doing this, and in many ways, it would be a much more logical way of producing a set of legal rules to support the operation of the internal market.

Politically, it might be more controversial. Consumer law seems to be one of those areas which is still quite sensitive from a national perspective – after all, consumer law affects us all in one way or another. At present, the obligation to transpose a directive into national law which requires the adoption of national legislation can be used by a national government as an opportunity to promote itself as a "consumer-friendly" administration, even though there was no choice but to adopt such national legislation to avoid falling foul of obligations under the EU Treaty. Although consumer law is already to a significant degree EU law, it is largely only legally effective as part of national law. The adoption of a Regulation would obviously change this. There would be one single EU text, which would be directly applicable. Not only would there not be national consumer legislation, it would also be very obvious that consumer law was effectively now European law. That could politically be difficult, although it could also be explained on the basis that the internal market opens up greater choice to consumers and lower prices, and so a standardised legal framework will be of huge benefit to consumers. On the other hand, if consumers are

not particularly concerned about national consumer law now, would they really be significantly worried if it were replaced by an EU Regulation?

AN EU CROSS-BORDER-ONLY REGULATION FOR CONSUMER CONTRACTS?

But perhaps one can avoid the "either-or" scenario which the move to a Regulation would entail. Instead, one might be able to have the best of both worlds, i.e., both national law and European law. The debate about the optional instrument certainly seems to envisage such a possibility, with traders and consumers potentially having the choice to enter into a contract on the basis of either national law or the EU optional instrument. This dual approach may have a lot going for it, although I would like to suggest that an alternative dual approach may be more appropriate, and also politically perhaps more defensible.

I start from the fact that the EU is concerned with the operation of the internal market. The focus is therefore on transactions which cross jurisdictional borders – e.g., a Slovakian consumer buying goods from a Swedish trader. The EU's concern is not with a German consumer buying goods at this local shop in Berlin. However, the harmonisation approach did not distinguish between different what can be termed "cross-border" and "domestic" situations. Similarly, it is far from clear whether the optional instrument which might eventually emerge will make this distinction. My argument is that the EU should properly concern itself with the cross-border context, and leave domestic transactions to be dealt with under domestic law, allowing for variations based on a range of factors, including political and regional preferences.

However, whilst this may be stated easily in the abstract, it does raise a fundamental definitional issue: how does one distinguish between cross-border and domestic transactions? The following five circumstances illustrate this problem:

(1) Consumer and trader are based in the same jurisdiction.
(2) Consumer and trader are based in separate jurisdictions and the contract is concluded at a distance (on-line).
(3) Consumer and trader are based in separate jurisdictions but in a border region and the consumer travels into the neighbouring country to conclude a contract face-to-face.
(4) A variant on (3), but the consumer is on holiday in another country and concludes a contract face-to-face.

(5) Consumer and trader are based in separate jurisdictions, but the trader visits the consumer and concludes a contract (eg, door-step selling; markets; exhibitions)

Which of these could be described as cross-border transactions? Clearly, only (1) is obviously a domestic transaction. All others have some kind of cross-border element. But should they all be treated as cross-border transactions for the purposes of delineating the reach of an EU Consumer Law regulation? In all of these situations, there may be practical difficulties in making it clear to both trader and consumer that there is a cross-border element involved. It seems to be that the easiest case is (2), although it must be acknowledged that there is some concern about de-localisation in the context of the internet, i.e., the difficulty of knowing with certainty where a consumer and trader respectively are based. (3)-(5) are more difficult, and I would suggest that these should not be treated as cross-border transactions. It seems to me that a consumer who physically goes to another country will have some basic awareness that they are in a different legal system, and will probably anticipate that the law of that jurisdiction will apply. So perhaps those situations could be removed from the legal understanding of "cross-border" contracts. That would leave distance transactions. With the European Commission having identified the internet as the obvious mechanism by which consumers can access the internal market, the focus on cross-border online/distance transactions seems entirely appropriate.

I would therefore argue that the way forward for EU consumer law is to abandon harmonisation by directives, shift to a Regulation, and confine action to cross-border distance/online contracts. This is not uncontroversial, but this is certainly one issue that is being debated at present as part of the discussions emerging from the 2010 Green Paper. Although there are many opposed to a cross-border only focus, it is anything but an unsupported position. It remains to be seen whether this view will win the day – we will not find out until later in the year when the Commission announces its plans for future action.

"Blue button" or automatic application?

There is one observation I wish to add: the current European debate is about an "optional instrument", i.e., an alternative legal framework which can be chosen by

trader and consumers. Following an idea by my colleague and friend Professor Hans Schulte-Nölke from Osnabrück University in Germany, this is usually referred to as the "blue button", based on the possibility to give consumers dealing with an e-trader the choice to contract on the basis of national law or, by clicking on a "blue button" (effectively an icon based on the EU flag) to go for the optional instrument instead.[25]
However, I am unconvinced that the idea of "optionality" would truly work in the consumer context. It seems to me that a trader will either want to contract with consumers from another jurisdiction on the basis of the optional instrument only, or not at all. The optionality element also raises all sorts of difficulties from a conflict of laws perspective which I cannot go into now (suffice it to say that at two recent conferences, there were very long discussions about these aspects – in one instance lasting several hours, with no solution at the end). I would favour the automatic application of EU law for cross-border consumer contracts as defined, leaving domestic law to deal with all remaining contracts.
As this is an on-going debate, it remains to be seen which position will win the day.

LAW VS. PRACTICAL CONSIDERATIONS

Ultimately, it seems to me that irrespective of the legal framework, practical considerations are much more likely to influence a consumer's willingness to buy goods from abroad. At the start of my lecture, I mentioned language and transport as being important factors. However, I think the most significant concern will be what is suggested in the title of tonight's lecture – "what will I do if it doesn't work"? A consumer who has bought goods locally will return them to the shop and ask for his money back, a replacement or possibly agree to repair. Importantly, the consumer can discuss the problem face-to-face with the trader. When it comes to the internal market, the practical difficulty of raising a problem with a trader might be the greatest deterrent for a consumer. With the exception of border regions, the physical distance between a consumer and a trader in another jurisdiction will make it much more difficult to get things put right. It is not impossible but more complicated, and whilst the EU has put some mechanisms into place, these are not widely-known and therefore of limited practical assistance.

[25] H. Schulte-Nölke, 'EC law on the formation of contract – from the Common Frame of Reference to the "blue button"' 3 (2007) *European Review of Contract Law* 332-349; H. Schulte-Nölke, 'The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws', in C. Twigg-Flesner (ed), *Cambridge Companion to European Union Private Law* (Cambridge University Press, 2010).

“What will I do if it doesn’t work?” – Hope for the best...

Thank you.